

In re: GEORGE A. BARGERY.
FCIA Docket No. 00-0006.
Decision and Order.
Filed October 4, 2002.

FCIA – Default – Summary judgement – Fraud, insurance.

Donald McAmis, for Complainant.

Phillip Fraas, for Respondent.

Decision and Order issued by James W. Hunt, Administrative Law Judge.

The complaint herein was filed on September 12, 2000, by the Federal Crop Insurance Corporation under section 506(n) of the Federal Crop Insurance Act (“FCIA”) (7 U.S.C. § 1506(n)) and subpart R of the Regulation (7 C.F.R. § 400.451 - 400.500). It alleges that in 1991 Respondent, George A. Bargery, wilfully and intentionally provided false and inaccurate information with respect to an insurance plan or policy under the FCIA and that on April 21, 1999, Respondent was convicted by a U.S. District Court of knowingly making false statements under the FCIA. The complaint seeks to disqualify Respondent from purchasing catastrophic risk protection for one year and from receiving any other benefit under the FCIA for a period of five years.

In his answer Respondent stated, *inter alia*, that he was convicted pursuant to a plea agreement of one count of conspiracy to defraud the Federal Crop Insurance Corporation, that the proposed penalty is excessive, that the complaint is barred by a “general statute of limitations,” and that the Complainant lacks jurisdiction because subpart R of the regulations applies only to acts occurring after October 14, 1993.

Complainant replied with a Motion for Summary Judgment. It contended that, as Respondent admitted that he had been convicted of violating the FCIA, there are no material issues of fact and that its jurisdiction in this matter was conferred when FCIA was enacted in 1990.

Respondent filed objections to Complainant’s motion, and filed a Counter Motion for Summary Judgment, in which he contended, *inter alia*, that the complaint is barred because 28 U.S.C. § 2462 requires that a proceeding for the enforcement of a civil penalty be commenced within five years of the date the violation occurred. In this instance the violation occurred in 1991 but the complaint was not filed until 2000.

Complainant filed a “Counter Statement” contending that Section 2462 of Title 28 of the United States Code is inapplicable to this matter because Section 2462 is concerned with proceedings involving a punitive penalty or forfeiture, whereas this matter concerns a disqualification from participation in the crop insurance program. It contends that this is remedial in nature and akin to revocation of a privilege, which is not a punitive measure. In its reply Respondent argues that the sanction proposed by the complaint is punitive.

The Department’s Rules of Practice do not specifically provide for a motion for summary judgment, but does prohibit motions for judgments based on the pleadings. The Federal Rules of Civil Procedure, which provide for summary judgments, are not applicable to Department proceedings. *Ron Morrow*, 53 Agric. Dec. 144, 154 (1994); *James Joseph Hickey*, 53 Agric. Dec. 1087, 1097 (1994). However, the Administrative Procedure Act, which does control this proceeding, does not preclude summary judgments. Koch, *Administrative Law and Practice*, § 5.77 (West Publishing Co., 1985). The Department has also ruled that, when facts established in a collateral proceeding show that there is no material issue of fact, a decision without hearing – in effect a summary judgment – can be issued. See e.g., *Veg-Mix, Inc.*, 44 Agric. Dec. 1583, 1590 (1985), *aff’d in relevant part*, *Veg-Mix, Inc. v. USDA*, 832 F.2d 601, 607-608 (D.C. Cir. 1987). Accordingly, as a collateral action shows that there is no material issue of fact in this matter, the respective motions for summary judgment by Complainant and Respondent will be entertained.

28 U.S.C. § states in relevant part:

[A]n action, suit, or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued. . . .

Section 2462 applies to administrative penalty proceedings as well as judicial actions and the three circuits that have considered the issue have held that the five years in which an administrative enforcement proceeding must be instituted starts with the date the alleged violation occurred¹ *U.S. v. Core Laboratories, Inc.*, 759 F.2d 480 (5th Cir. 1985); *U.S. v. Meyer*, 808 F.2d 912 (1st Cir. 1987); *3M Co. v.*

¹The Court in *3M Co. v. Browner*, *infra*, also held that an agency has another five years following the assessment of a penalty to institute a judicial action to enforce the penalty.

Browner, 17 F.3d 1453 (D.C. Cir. 1994). Thus, if section 2462 is applicable to this matter, it is barred by that section because it was instituted over five years after Respondent's violation occurred.

Complainant contends that the section is not applicable to this matter because it applies to punitive actions and that the sanction it seeks here – disqualification from the federal crop insurance program – is suspension of a privilege and is not punitive.

The Department, however, has held that its purpose in seeking sanctions in its enforcement of federal statutes is to punish violators in order to deter them from future violations. *Spencer Livestock Commission*, 46 Agric. Dec. 268, 437-446 (1987).² It considers any statute that allows a person to engage in a regulated business to be granting the person a privilege (*Id* at 436) and that a sanction to remedy a violation of the statute should be a suspension or revocation of the privilege. Respondent stated in his affidavit that “I could not get financing to farm commercially as I am doing now if I could not get crop insurance.”

I find that the effects of the sanction sought in the complaint is punitive and that this matter is therefore a proceeding for the enforcement of a civil penalty. As it was not instituted within five years from the date of the accrual of the action, the complaint is barred by 28 U.S.C. § 2462. Accordingly, Complainant's Motion for Summary Judgment is denied and Respondent's Motion for Summary Judgment is granted. The complaint will be ordered dismissed.

Order

The complaint, filed September 12, 2000, is dismissed.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer by a party to the proceeding within 30 days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139, 1.145).

[This Decision and Order became final November 14, 2002.-Editor]

²The Department's sanction policy has been affirmed by the courts. See *Hutto Stockyards, Inc.*, 48 Agric. Dec. 436, 486, fn. 28 (1989).

